

In 1989 claimant and several friends leased a missile silo near Waverly, Kansas, in Coffey County, for the purpose of recreational and social activities. Claimant began visiting the site in approximately 1990 continuing to do so on numerous occasions. In April,

1993, several of claimant's friends purchased a silo in Lyon County, Kansas, near Bushong.

Claimant visited this Lyon County site on numerous occasions in a social context. For a short period of time in 1993, claimant took up residence at the silo but, on July 18, after wrecking his car on the road to the silo and angering the owners of the property, claimant was forced to move. Claimant did not return to the silo until approximately March 27, 1994.

In early 1994 the owners of the silo, claimant's friends, began salvaging steel beams found in the roof. The evidence indicates the money obtained from these steel beams was placed back into the silo for purpose of refurbishing the property. Claimant and this group of friends began discussing the possibility of starting a salvage company to salvage metal from other missile silo sites and selling this metal for cash. At this point the story provided by claimant and the story provided by respondent's numerous witnesses begins to vary. Claimant alleges he was offered a specific employment opportunity by Mr. Dale McCormick. Claimant testified he was offered a lump sum payment of \$5,000 and seven percent (7%) of the gross profits obtained from the salvaging of the metal. Mr. McCormick and several other witnesses, including Mark Swaffer, Jeff Goodman, Ken Schick and Terry Lewis, dispute claimant's description of the meeting. These witnesses contend the conversation between the parties was an initial meeting with no definite plans made for any membership or partnership and no employment promises or offers made.

On the day after the meeting, March 28, 1994, claimant participated in cutting steel beams off of the roof as part of the restoration project of the Lyon County silo. The income from this material was, according to the testimony, placed back into the reconstruction of this particular silo.

On April 6, 1994, claimant, Dale McCormick, Ken Schick, Brad Winegar, Wade Shuler and Jeff Goodman were again discussing the property conditions surrounding the silo. Claimant suggested they make a list of things to do around the silo, including making several small repairs; cleaning up, picking up trash and fixing minor plumbing problems. The next day claimant was installing a security light in the yard of the silo. While using an acetylene torch, claimant's shirt caught on fire causing numerous burn injuries over approximately twenty percent (20%) of claimant's body. Claimant filed a workers compensation claim against the respondent, Atlas Metals.

Claimant contends that Atlas Metals was a legally formed company and he was an employee pursuant to the verbal agreement between himself, Dale McCormick and the other co-owners of the property.

The evidence in this matter is heavily weighted against claimant. Claimant is the only witness who testifies that any type of employment contract was created during the meetings between he and the co-owners of the property. There is no documentation to support claimant's contentions that any type of contractual arrangement was made. Claimant was never paid any money as a result of any of his labors at the silo site. It is also significant that the activities being performed by claimant did not involve the salvaging of metal, but instead involved, what appears to be, housekeeping duties around the silo site that claimant was, on a periodic basis, using as a residence. The money obtained from the salvaging of metal, from that particular silo site, was placed back into the site in order to make the property more habitable.

The numerous witnesses testifying in this matter, either through deposition or by affidavit, contest the claimant's contention that a deal of some type had been made, all agreeing no such employment agreement or deal had ever been entered into between claimant and any of the parties present.

While income was made by Atlas Metals as a result of salvaging metal from other silo sites, there is no indication in the record that claimant ever participated in any of this income producing activity. The witnesses, with the exception of claimant, agree that the discussion on March 27 was just a round table discussion about what possibly could happen in the future, with no specifics agreed to by any of the parties present.

In a workers compensation matter, it is the burden of the claimant to establish his right to compensation by proving all of the conditions upon which in his right to recovery depends by a preponderance of the credible evidence. See K.S.A 44-501 and K.S.A 44-508(g). See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Appeals Boards finds, based upon the evidence presented, that the claimant has failed in his burden of proving that an employer/employee contract was ever contemplated or created by the parties and, as such, claimant cannot be found to be an employee of Atlas Metals for purpose of obtaining workers compensation benefits. In the absence of an employer/employee relationship, claimant has not sustained his burden of proving, by a preponderance of the credible evidence, that he suffered accidental injury arising out of and in the course of his employment with the respondent.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward dated August 4, 1995, denying claimant benefits, shall be, and is hereby, affirmed in all respects

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark A. Buck, Topeka, Kansas  
Steven M. Tilton, Topeka, Kansas  
Edwin H. Bideau, Chanute, Kansas  
James R. Ward, Administrative Law Judge  
Philip S. Harness, Director